3183

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 341.

SANFORD JACOBI, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

FILED MAY 31, 1902.

(18,550.)

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Supreme Court of Alabama.

Filed Dec. 16 1901.

ROB'T F. LIGON, JR., *Clerk*

SANFORD JACOBI
vs.
THE STATE OF ALABAMA. } 3 Div., 289.

Appeal from Montgomery city court.

Dec. 19, 1901.—Passed to Thursday of call of 2nd div.
Feb. 13, 1902.—Argued and submitted.
April 17, 1902.—Affirmed. McClellan, C. J.

1 *Organization of Court, July Term*, 1900.

THE STATE OF ALABAMA, }
Montgomery County. }

Be it remembered that at a term of the city court of Montgomery, begun and holden for said county at the court-house in the city of Montgomery, State and county aforesaid, on the second Monday in July in the year of our Lord one thousand nine hundred, it being the ninth day of said month—present the Honorable A. D. Sayre judge presiding—the following proceedings were had and the following judgments were rendered to wit:

Indictment.

THE STATE OF ALABAMA, }
Montgomery County. }

City Court of Montgomery, July Term, A. D. 1900.

The grand jury of said county charge that before the finding of this indictment Sanford Jacobi did assault Lizzie Parker, a woman, with the intent forcibly to ravish her, against the peace and dignity of the State of Alabama.

TENNENT LOMAX,
Solicitor for the County of Montgomery.

No prosecutor.
A true bill.

J. B. SLAUGHTER,
Foreman of the Grand Jury.

G. J. No. 138.

Presented in open court by the foreman of the grand jury in the presence of (18) eighteen other members of the grand jury this the 13th day of July A. D. 1900

H. H. MATTHEWS,
Clerk of the City Court of Montgomery.

Filed this 23th day of July 1900.

H. H. MATTHEWS,
Clerk of the City Court of Montgomery.

2 *Organization of Court, July Term,* 1901.

THE STATE OF ALABAMA, }
Montgomery County. }

Be it remembered that — a term of the city court of Montgomery begun and holden for said county at the court-house in the city of Montgomery, State and county aforesaid, on the first Monday in July in the year of our Lord one thousand nine hundred and one, it being the first day of said month,—present the Honorable A. D. Sayre judge presiding—the following proceedings were had and the following judgments were rendered to wit:

TUESDAY, *August 6th, A. D.* 1901.

Court met pursuant to adjournment.
Present: The Hon. Wm. H. Thomas, associate judge presiding.

THE STATE *vs.* SANFORD JACOBI. } 702. Indictment for Assault to Ravish.

Jury and Verdict.

This the 6th day of August 1901 came Tennent Lomax, solicitor who prosecutes for the State of Alabama, and came also the defendant *also* in his own proper person and by attorney and the said defendant being duly arraigned upon the indictment for his plea thereto says he is "not guilty;" thereupon came a jury of good and lawful men to wit: A. J. Jones and eleven others, who being duly empaneled and sworn according to law upon their oaths do say: "We the jury find the defendant guilty as charged." It is therefore considered and adjudged by the court that the said defendant Sanford Jacobi is guilty as charged in the indictment, and he was remanded to jail to await the sentence of the law.

3 SATURDAY, *August 17th, A. D.* 1901.

Court met pursuant to adjournment.
Present: Hon. Wm. H. Thomas, associate judge, presiding.

THE STATE
vs.
SANFORD JACOBI. } 702. Indictment for Assault to Ravish.

Sentence.

And now upon this day the 17th day of August 1901, the said defendant being now in open court, and it appearing to the court that the said defendant was duly convicted of said offense on a former day of this term, and the defendant's motion for a new trial coming on to be heard and the same being argued by counsel and understood by the court, it is considered, ordered and adjudged by the court that the said motion be and the same is hereby overruled and the said defendant being asked by the court if he had anything to say why the sentence of the law should not now be pronounced upon him says nothing. It is therefore considered by the court and it is the judgment of the court that the said defendant be imprisoned in the penitentiary of the State of Alabama for a term of twenty (20) years beginning from this day. And before passing sentence the court proceeded to ascertain by examination of such convict and other evidence that such convict has been engaged in grocery business and that the cause of the commission of this crime is unknown. Said convict is of the male sex white race and about 21 years of age, and his physical condition is fairly good.

And questions of law arising in this case for the decision of the supreme court of Alabama, it is considered and ordered by the court that this sentence be suspended pending the said defendant's appeal to the said supreme court of Alabama.

And it is further considered and ordered by the court that the defendant is hereby allowed until the first day of November, 1901, to prepare and present his bill of exceptions.

THE STATE OF ALABAMA,
Montgomery County.

4 Be it remembered that at a term of the city court of Montgomery begun and holden for said county at the court-house in the city of Montgomery, State and county —, on the second Monday in October in the year of our Lord one thousand nine hundred and one, it being the fourteenth day of said month present the Honorable Wm. H. Thomas, associate judge presiding the following proceedings were had and the following judgments were rendered to wit:

THURSDAY, *October* 31*st*, 1901.

Court met pursuant to adjournment
Present: The Hon. Wm. H. Thomas, associate judge presiding.

THE STATE
vs.
SANFORD JACOBI. } 702. Indictment for Assault to Ravish.

It is ordered by the court that the time in which the defendant is required to prepare and present a bill of exceptions in this cause be and the same is hereby extended until the 25th day of November, 1901.

In the City Court of Montgomery, Alabama, July Term, 1901.

STATE OF ALABAMA
vs.
SANFORD JACOBI.

Be it remembered that this cause came on to be heard in the city court of Montgomery, Alabama, on the 5th day of August, 1901, Honorable W. H. Thomas, associate judge of the city court of Montgomery, presiding, and that the following proceedings were had to wit:

W. H. MAYBIN was introduced as a witness for the State, and testified as follows, to wit: That on the night of June 23rd, 1900, he was at the Union passenger depot in the city of Montgomery, between the hours of nine and ten o'clock, having gone there to meet his daughter, whom he expected to arrive that night over the Mobile & Ohio road from Texas; that his daughter did not arrive, and that he was about to leave the station-house by the south door when he saw a young lady, whom he afterwards learned to be Miss Lizzie Parker, go to the window of the ticket agent and ask him a question about the train stopping at Clanton; that he didn't hear the conversation that passed between her and the ticket agent, but shortly afterwards, she passed through the station building, and when near the south doors, where there are double hanging doors, defendant was talking to Miss Parker as witness came up, he heard her ask Mr. Norris, an agent of the Haygood transfer hack line, if he could furnish her a carriage to take her to Highland park; that she had a relative by the name of Gallaspie living at Highland park, and she also mentioned the name of another by the name of Stanfield. Jacobi, the defendant, was standing in one of said south doors, and he spoke to Miss Parker and said that he knew Mr. Stanfield, that he was his next-door neighbor, and was a friend of his. Miss Parker then got into a hack, driven by a negro by the name of Jones, which was standing near the door and under the carriage shed on the south side of the passenger station, to go to Highland park, the negro having agreed to convey her to Highland park for seventy-five cents, witness told Miss Parker while she was sitting in the carriage, that his wife kept a boarding-house

at No. 223 South Court street; that this house was conveniently located with respect to the depot, and that, if she would go with him to this place, he would entertain her for the night for fifty cents, give her a good breakfast in the morning, and see to it that she got to the station in time to take the train to Clanton the next morning. He also told her that it was more than a mile to Highland park, that the weather was inclement, and that it would be better for her to accept his proposition than to go with the negro to Highland park; that the negro said to him, "Mr. Maybin, you ought not to be interfering with my customers. This is not the first time you have done this." Witness replied, "If you don't attend to your business I will whack
6 you over the head with this stick," raising a cane he held in his hand at that time. All this occurred in the hearing of Miss Parker, who was a stranger to witness, he never having seen her before that night. Defendant than said to witness, "Mr. Maybin I would not do that, the hackman will hurt your boarding-house." Miss Parker descended from the carriage and witness took in his hand her hat-box and small satchel, and after they had traveled along Water street as far as the Windsor hotel, and had turned up Commerce street, south, just around the corner, witness and Miss Parker were overtaken by the defendant, Sanford Jacobi, but just before defendant approached witness and Miss Parker, defendant spoke to a hackman as he passed the hack. Defendant then overtaking witness and Miss Parker, said to Miss Parker, "I heard you mention the name of Mr. Stanfield a little while ago. He is a particular friend of mine. He clerks at Worswick's shoe store uptown, and I will go with you to his place of business and he will likely accompany you to his house," witness dissented and advised the young lady not to go with Jacobi, the defendant. Jacobi told her "If Mr. Stanfield is not at Worswick's store I can bring you back to Mr. Maybin's boarding-house." The young lady, thereupon consented to go with the defendant, and they walked off together south, up Commerce street, the defendant carrying the hat-box and satchel for her. They walked together up Commerce street as far as Tallapoosa street, turned thence east in the direction of Jefferson street, witness following closely behind them. They proceeding along Tallapoosa and Jefferson streets to the southeast corner of Jefferson and McDonough streets. Witness was close enough to see the couple all the while, but not near enough to hear what they said. The couple did not look back when they reached the said corner of Jefferson and McDonough streets, they went to the steps of the building, standing in the southeast corner of said streets known as Wadsworth's lumber yard, and there they stopped. The defendant knocked on the door of the office, and witness heard him say, "It is dark on the inside, and nobody seems to be in."
7 Witness was standing in the shade of a tree on the west side of McDonough street during this time. The couple crossed over from the east to the west side of McDonough street, and went thence south to Dexter avenue, witness following close behind, and keeping them in full view all the while. When they reached a poin

on McDonough street near the Second Methodist church, nearly opposite the residence of Judge Gaston, the defendant, Jacobi, called to a carriage that was going east in the direction of the capitol. He and Miss Parker got in the carriage near said church at the intersection of McDonough street and Dexter avenue, and drove off in the direction of the capitol. Witness followed behind for the distance of a block as far as Decatur street and saw the carriage turn north down Bainbridge street, in front of the capitol, when he turned and went to his home. Witness met Jacobi next day at Knabe's corner and said to him, "You didn't bring the young lady around last night," to which Jacobi replied "No she found her people" and then defendant turned and walked off. Witness admitted on cross-examination that he had made some hostile expressions against Jacobi and had said that he would be one to head a mob to lynch him.

Mr. JAMES O. NORRIS, who was introduced as a witness by the State, testified he was one of the agents of the Haygood hack transfer line, and was at the Union passenger depot on the night of June 23rd, 1900; that he saw Miss Lizzie Parker, whom he had never met before, there near the south doors of the station-house at about 9:30 o'clock, on the arrival of the north-bound L. & N. train that night,—that is to say, the train that came from Mobile that day; that she asked for a carriage to take her to No. 650 Highland park to spend the night with the family of a relative named Gallaspie; that witness told her there was no such number as 650 Highland park, that she must have reference to 650 Highland avenue. Jacobi said I know the people very well, they do live on Highland avenue. She said that was what she meant, and that she wanted to go there to spend the night with a relative, by the name of Gallaspie; she also mentioned the fact that she had a relative living in Montgomery somewhere by the name of Stanfield
8 but did not know the street upon which he resided; it had been raining hard that afternoon; the night was dark and the weather was somewhat inclement. Witness called the carriage with the negro Jones as a driver, and directed him to convey Miss Parker to Highland avenue, near Highland park, and not to charge her more than 75 cents therefor. He saw her get in the carriage and he then turned away. I heard Miss Parker mention the name of Stanfield and Jacobi said "Stanfield worked for Wadsworth and Co. and he is a very close friend of mine."

The State introduced ED. IVERSON as a witness, who testified that he was a hack-driver in the city of Montgomery, Alabama; that on the night of June 23rd, 1900, somewhere close to the hour of ten, he was driving down Dexter avenue from the direction of the capitol toward the basin on Court square; that a little boy overtook me in front of Curbow and Clapp marble yard and said a man at the corner wants a hack. Witness turned and drove back to the northwest cor. of Dexter avenue and McDonough St. and after he had gotten on the crossing at said corner near the Banks residence he

drove up along the curbing near the northwest corner of Dexter avenue and McDonough street and stopped hack on the crossing where a lady who was with def't got in the carriage; that a couple was coming across Dexter avenue from the south to the north side at that point, and that the defendant told him to drive up a little ways and that in accordance with this direction or instruction he drove a few steps off the crossing and stopped, when Jacobi got in the carriage; that the carriage he was driving was a single-horse vehicle, and that the curtain between the seat occupied by the driver and the rear seat occupied by the defendant and Miss Parker was so drawn up and across as to entirely obstruct the driver's view from them,—that is to say, he could not see them, nor they see him, but the hack was not shut in on the sides. That when they got to Hull street a car came up Dexter avenue and the lady asked def't if that was not her car and def't answered "No." That he drove the carriage as far as Decatur street without receiving any instructions from Jacobi where
9 to go; that when they reached Decatur street Jacobi said to him from the rear seat which he was occupying in the carriage "Don't you know where Mary Graves lives," witness replied that "Mary Graves had broken up and gone to Mobile." Jacobi then said "Take us to Mat Howard's." Miss Parker, from the rear seat which she was occupying in said carriage, said to Jacobi loud enough to be heard by witness, "Is that a nice boarding-house?" And Jacobi answered "Yes." The lady then said "You all are taking me mighty far to a nice boarding-house, are you sure that it is a nice boarding-house," and def't said "It was." Witness then drove his carriage as far east as Bainbridge street, and thence north to Pollard street, and thence east to Mat Howard's house. This house is situated on the south side of Pollard street, and the veranda, which is about four or five feet wide, was just a few feet from the front gate. Witness drove the carriage to the sidewalk close to the gate. Jacobi told witness to go to the door and ring the bell, witness went to the door and found it locked, and no light in the house, and rang the bell, there being no response he said to Jacobi, "Mat Howard seems to be asleep." Jacobi said, "I will get out and wake her up." Thereupon the defendant descended from the carriage, went to the front door, shook the door knob for a few minutes until Mat Howard, who is a large negro woman, came to the door and opened it, holding a lighted lamp in her hand, and being in her night-gown. Jacobi said something to her, then came back to the carriage, and assisted Miss Parker in alighting therefrom. Jacobi had the hat-box and satchel in his hands and he and Miss Parker went into the front door of the house together. From the porch Jacobi told witness, while Miss Parker was standing on the front porch beside him, to come back the next morning by six o'clock so as to get her to the depot in time to take the train for Clanton, and Miss Parker thanked Jacobi and said to him "If you have got me a nice boarding-house you go back in the hack" and he said "No, I want to sit and talk awhile and I will walk back." The couple then went into the house and witness drove his carriage to a

store on the corner of Union and Pollard streets. While
10 there he was accosted by mounted police officers, Cowling and Rapport, who asked him who the couple was who had just gone into Mat Howard's house. The witness replied, "You are too late, they are country people that have just come from the train and I don't know their names." Witness further testified that there was an electric light burning at the store just referred to and also on the corner of Decatur and Pollard's streets, west of Mat Howard's house, and that Mat Howard's house was about midway the block between Union and Decatur streets, and that there were houses on either side of the house occupied by Mat Howard. Witness further testified that Mat Howard's house was an assignation-house.

The State in laying predicate for the introduction of secondary evidence of the testimony of an absent witness, Miss Lizzie Parker, who had testified in this case on a former trial, introduced in evidence to the court the testimony of the following witnesses: Henry Hughes, C. E. Thomas, and H. H. Matthews & attachments to Butler, Jefferson and Chilton counties and returns thereon, all of which testimony was excluded by the court from the consideration of the jury.

The State introduced as a witness HENRY HUGHES who testified that he was assistant clerk of the city court of Montgomery, and that subpœnas had been issued at the instance of the State to Miss Parker, returnable at and to a former term of the court, commanding the attendance of said Miss Parker as a witness for the State in this case, and as well as to the present term of the court, that said subpœnas were sent to the counties of Chilton and Jefferson and that the same had been duly returned "not found," by the sheriff of each of said counties; that thereupon attachments for her had been issued at the instance of the State at the last term of this court and sent to sheriffs of Butler, Chilton and Jefferson counties, and returned "not found" except as to Butler county, from which there had been no return. The State then introduced in evidence the at-
tachments for Miss Parker, which had been sent to the coun-
11 ties of Chilton and Jefferson, with the endorsements of the sheriffs thereon. The endorsement of the sheriff of Chilton county read; "Not found in this county. She is in Birmingham, Alabama" and was dated — day of ——. So much of the endorsement of the sheriff of Jefferson county as was allowed by the court to be introduced in evidence read as follows: "Not found in this county" dated 5th day of July, 1901. Defendant objected separately and severally to the testimony of the witness Hughes, and the introduction in evidence of each of said writs of attachment, together with the endorsements thereon at the time they were each offered in evidence, upon the grounds:

1st. That each of the same was illegal.

2nd. That each of the same was irrelevant.

3rd. That each of the same was incompetent.

The court overruled each and every of said objections thus made by the defendant, and admitted the above said evidence, as offered

by the State for the consideration of the court and not of the jury, and to this action and ruling of the court the defendant thereupon duly excepted.

H. H. MATTHEWS was examined as a witness for the State to the court and testified he was clerk of the city court of Montgomery, that there was a mistrial in the case of The State *vs.* Sanford Jacobi wherein Miss Parker was sworn as a witness and examined and cross-examined and that a mistrial in said case was entered on the 12th day of November 1900, and that the next term of the city court began on the first Monday in February, 1901. This testimony was also excluded by the court from the consideration of the jury, being offered to the court as a part of the predicate.

The State next examined as a witness one C. E. THOMAS, who testified that he is a half-brother of Miss Lizzie Parker of Clanton, Alabama; that he resides in Birmingham, Alabama, and has been residing and was so residing there on the 23rd day of June, 1900; that he had not resided with his mother and sister for the past five or
12 six years; that on or about the 23rd day of June, 1900, his mother, who was then residing at Clanton, became quite ill, and wired for witness to come to her bedside. She also summonsed his sister, Miss Lizzie Parker, who was on a visit to relatives at Chapman, in Butler county, and that she arrived at Clanton on Sunday the 24th day of June, 1900; that his sister said nothing to him as to what occurred between her and Sanford Jacobi in Montgomery on the previous night, and that he knew nothing of it until he saw and read a publication thereof in the Montgomery Advertiser on Tuesday morning, June 26th 1900; that he then mentioned the matter to his sister and she said she was sorry any publicity had been given to the matter, as it would tend to injure her. Witness then further testified that Miss Lizzie Parker was about twenty-three years old in June 1900 and lived with her mother at Clanton, Alabama, and that she had no other home than with her mother, and that her mother had no other home in June, 1900, that his mother is a widow, that some time in the month of January, 1901, his mother broke up her home in Alabama, and sold her house and lot and sold off all her household goods except a little furniture which had not yet been sold, broke up housekeeping and went to Georgia; that his sister, Lizzie Parker had gone to Georgia before her, about the first of January, 1901, that he had received a letter from his sister, Lizzie, which he knew to be in her handwriting, about two weeks before the date of this trial, from Buena Vista, Georgia, the envelope containing said letter being postmarked Buena Vista, Ga. That his sister is an unmarried woman and has no home other than that of her mother; that witness, at the time she left Alabama, did not say anything about a change of domicile, or about leaving the State permanently, or about acquiring a residence elswhere than in Alabama; that witness did not know when his sister would return to Alabama, if at all; and that he knew nothing whatever about her intentions upon this subject. Witness

further testified that his sister, Miss Lizzie Parker, had testified as a witness for the State at the October term 1900, on the trial of the case of The State vs. Sanford Jacobi, under this same
13 indictment, and that said trial resulted in a mistrial. On cross-examination, in answer to a question propounded by the defendant to witness as follows, "Are you able to state whether or not your sister's stay in Georgia is indefinite?" witness answered he could not. In answer to another question propounded by defendant, witness said he was not able to state whether or not his sister Lizzie Parker was in the State of Alabama at this time or not; nor was he able to say whether or not she had been continuously absent from the State of Alabama from the time she left Clanton in January 1901, up to the time witness received said letter from some point in Georgia, the envelope of which was postmarked "Buena Vista, Ga." as testified to above.

The defendant thereupon objected to the testimony, thus sought to be elicited by the State as to the absence of Miss Parker from the State of Alabama, and moved to exclude all of the same upon the grounds that it was illegal, irrelevant, inadmissible and incompetent, and, lastly, that it was not sufficient to establish a predicate for the introduction of the testimony of the said Lizzie Parker on the former trial of this cause: pending said objection and decision State asked leave of court to recall witness Thomas, by permision of the court he was recalled by the State, and told to take the witness stand. He then further testified, as a witness for the State, in answer to questions propounded by the solicitor, said that shortly after the former trial, which occurred in November, 1900, he had a conversation with his sister, Lizzie Parker, in reference to said trial, in which she stated, "I had rather die than to come back to another trial and go through the same ordeal." The court instructed the jury that this evidence was to the court and not for the consideration of the jury. The defendant objected to this testimony and moved to exclude the same upon the grounds:

1st. That the same was illegal, irrelevant, inadmissible and incompetent.

2nd. That it was merely hearsay.

3rd. That this conversation was not had with Miss Parker at or about the time she left the State of Alabama, or contem-
14 plated leaving the State and that it had no connection therewith.

4th. It formed no part of a proper predicate for the introduction of the evidence of said Miss Lizzie Parker on a former trial of this case, and

5th. That the defendant has the constitutional right to be confronted by Miss Parker.

But the court overruled each and all of defendant's objections and permitted the testimony of said witness, Thomas, to be received in evidence for the consideration of the court alone and not of the jury; and to this action and ruling of the court defendant then and there duly excepted. Defendant thereupon renewed the objection to testimony of witness Thomas hereinabove set forth and the court

overruled the objection and admitted the testimony of said Thomas for the consideration of the court upon the question of the admissibility of the testimony of the absent witness, Miss Parker, and instructed the jury that none of said testimony was for their consideration. Defendant duly and legally excepted. The court several times instructed the jury that none of the testimony of the witnesses, Hughes, Matthews and Thomas was for the consideration of the jury but was addressed to the court and the jury could not consider same.

The State then introduced as a witness, W. H. Micou, who testified that he was a juror on the former trial of the case of The State *vs.* Sanford Jacobi, tried in the month of November, 1900, in the city court of Montgomery, and proposed to prove by said witness the testimony of said Miss Parker as he remembered it. The State asked said witness this question "Do you remember that Miss Lizzie Parker was sworn and examined by the State and cross-examined by the defendant on a former trial of this case in November, 1900, in the city of Montgomery, Alabama?" Witness then answered that he did. He was then asked by the State, "Do you remember the substance of her testimony on direct and cross-examination on said trial?" Witness answered that he did. The State then requested the witness to state in substance the testimony of said Lizzie Parker. Thereupon the defendant objected to the witness Micou testifying as to the testimony of said Lizzie Parker on the former trial of this case, upon the following grounds:

1st. That the defendant, Jacobi, has the constitutional right to be confronted by the witnesses against him.

2nd. That no sufficient predicate had been laid showing that the said Lizzie Parker was outside of the State of Alabama at the time of this trial.

3rd. That no sufficient predicate had been laid to show that the said Lizzie Parker was permanently outside of the State of Alabama.

4th. That no sufficient predicate had been laid to show that the stay of said Lizzie Parker, if absent from the State of Alabama at this time, was indefinite, contingent or uncertain.

5th. That the proposed testimony of the witness Micou, was purely hearsay.

6th. That no sufficient diligence had been shown by the State in its efforts to serve said Lizzie Parker with process in this case.

The court overruled defendant's objections, and each ground thereof, and permitted the witness, Micou, to testify as to what was the evidence of said Lizzie Parker on said former trial on the direct and cross-examinations aforesaid. To this action and ruling of the court the defendant then and there duly and severally excepted.

Witness, Micou, continuing, testified that Miss Parker's testimony on said former trial, on direct and cross-examination, was, in substance, as follows: That she had been on a visit, or had been teaching school near Chapman, in Butler county, that some time during the day of June 23rd, 1900, she had received a telegram

that her mother, who resided at Clanton, was very ill and asking her to come to her bedside; that she boarded the train at Georgiana, buying a ticket as far as Montgomery; that her train reached
16 Montgomery about 9.30 that night; that she was informed by the conductor that that particular north-bound train would not stop at Clanton without a permit; that immediately upon her arrival at Montgomery she went to the ticket office and asked the agent if an arrangement could be made for her by which the train would stop at Clanton that night; that the agent replied that there was not enough time intervening to permit the arrangement she desired to be made; thereupon she passed from the ticket office to the door and she asked the transfer man if he could furnish her with a carriage to take her out to Highland park, and also inquired what he would charge her for conveying her to that point; that she told him that she wanted to go to Highland park to spend the night with the family of a relative by the name of Gallaspie, and she also mentioned to him the fact that she had a relative living in Montgomery somewhere, by the name of Stanfield, that she saw Jacobi standing near the door, and he made some remark to her about knowing Stanfield; that she got in a carriage to go to Highland park and while seated in the carriage, a gentleman, who gave his name as Maybin, told her it was a good long ways to Highland park, the night was dark, and the weather inclement; that his wife had a boarding-house, and that if she would go with him to this boarding-house, his wife would entertain her for the night, give her a good breakfast and have her at the depot in time to catch the next morning train for Clanton, and would charge her therefor only fifty cents; that the negro driver protested against Mr. Maybin's interference with his business; that Maybin raised a stick and threatened to strike the driver; that she got out of the carriage and started with Maybin to his boarding-house, and Maybin took her hat-box and satchel in his hands; that they had walked along the street passed the corner of the Windsor hotel and had just turned up Commerce street near the hotel corner, they were overtaken by the defendant, Jacobi, whom she did not know and had never seen before that night; that she had never seen the said Maybin before
17 that night, and that both Maybin and the defendant were strangers to her; that the defendant Jacobi, when he became up besides us, he said to her; "I heard you mention the name of Mr. Stanfield a little while ago. I know that gentleman quite well, he is a particular friend of mine. He is a book-keeper at Wadsworth Lumber Company. This is Saturday night and he may be at the office now, paying off hands. I can go with you by Wadsworth Lumber Co.'s yard, and ascertain whether or not Mr. Stanfield is there. If he is there, you can go home with him; and if he is not there, it is not much out of the way, and I can bring you back to this gentleman's boarding-house (meaning Mr. Maybin) and Maybin gave him the number of his boarding-house and made Jacobi promise to bring her back to his house if he did not find Stanfield, she then went with the defendant. They went south along Commerce street to Tallapoosa street, thence in an easterly direction along Tal-

lapoosa street to Jefferson street, and thence east along Jefferson street to the southeast corner of Jefferson and McDonough streets, witness said Miss Parker did not use names of streets, but from the direction she gave he witness used the names of streets. Jacobi was attentive and polite, and used not a single indecorous word to her during this journey. He carried her bandbox and satchel in his hands. When they reached the office of Wadsworth Lumber Co., Jacobi said: "It is dark on the inside, and there does not seem to be anybody in the house. If I were you I would not go to that old man's house, it is a second-class place, I can take you a few blocks to Dexter avenue and there you can board a Highland Park car which will take you to Highland park for a nick*le*, or I will take you to a nice boarding-house." She consented to go, and they went south along McDonough street until they reached Dexter avenue. Mr. Jacobi was polite and attentive to her and sought to take no liberties with her whatever or to use any improper language to her. When they reached Dexter avenue, they saw a single-horse carriage coming from the direction of the capitol and going west along Dexter
18 avenue. Mr. Jacobi hailed the hackman who turned his hack around and came up close to the sidewalk. The curtains between the front seat occupied by the driver and the rear seat occupied by Jacobi and herself were up between her and the driver. Jacobi assisted her in the hack and told the driver to drive up a little. Jacobi got in a few feet further from the place where she got in said carriage. He whispered something to the driver which she did not hear or comprehend. After they had gone a block or two in the direction of the capit*al*, Jacobi said to the driver "Take us to Mary Graves'." The driver replied "Mary Graves has broke up and gone to Mobile to live." Jacobi then said "Take us to Mat Howard's." The driver said "All right." She then asked "Is that a nice boarding-house?" Jacobi said "Yes." After awhile they came to a house which was close to the sidewalk. She asked Jacobi again if it was a nice boarding-house and he said it was. Jacobi told the driver to go in and ring the bell, the driver, Iverson, knocked on the door several times, and then said "Mat Howard seems to be asleep, I can't wake her up." Jacobi said "Stay here and look after the horses and I will rouse her." He then went in the door, standing on the portico and by knocking on the door several times succeeded in waking the woman up. A negro woman in her *k*night clothes, holding a lighted lamp in her hand came to the door. Jacobi assisted Miss Parker out of the hack and they went in the house. Just before entering the house Jacobi told the driver, Iverson, while they were standing on the porch, to come back next morning by six o'clock to take her to the train. She asked him "Are you not going back in the hack?" He said "No, I will walk back." When they entered the hall she asked Jacobi where was the lady who owned the house and he said "It is all right, this is just the servant, the lady has stepped out." She was then ushered into a room with two windows in it. Jacobi locked the room door and took off his coat and told Miss Parker that she had to stay with him. The sash of both windows were raised, but

the blinds were closed. There was a bed in the room.
19 She sat down in the chair near one of the windows, Jacobi came up to her and took hold of her hat and pulled it off of her head, he then tried to sit in the chair with her, and she got up and moved to another chair and he came to that chair and he proposed that they should go to bed and have a good time for the night, saying that he had ordered a good breakfast and a hack for her so that she could reach the depot in time for the morning's train. She said to him "If you think I am going to stay all night with you, you are mistaken." He said: "Sweetheart, is this the way you are going to treat me after I have been so nice to you." She told him that she was not that kind of a girl and he said he would like to look into the face of a woman who was not that kind of a girl, and she said "You may look into mine." She told him that she would not go to bed with him. He said "Well, I am going to leave you," and he put on his coat and started to go away, said she was scared and weak and said to him: "Don't leave me, what in the world am I to do. I can't stay here." His reply was, "I don't know and I don't care, after I have been so nice to you as I have, then for you to treat me as you have done." Jacobi also said "Sweetheart, don't treat me this way; just pull off your shoes and corset, and let's have a good time." And she said, "I cannot do anything like that. It is not right, and I have got to protect my health and honor." He then said that it would not hurt her health; that no one need never know it; that they could spend the night together and have a good time; that he had ordered a good breakfast and a hack to have her at the depot in time to catch the train on which she wanted to go to Clanton. That no one need know anything about it except herself; that it would not hurt her health; that she could use a wet towel after she got through, and that no one would ever know anything about it; that everything would be all right; he then stooped down and tried to unfasten her shoe and she jumped up and went to the other side of the room. There was no chair there and she was very much frightened and very weak, and sat down on the side of the bed and Jacobi came
20 over to the bed and put his arms around her shoulders and pushed her over on the bed, and put one of his legs over her body and reached down and attempted to pull up her clothing; that his pants were unbuttoned and his private member was exposed. She struggled from under him and out of the bed, *and out of the bed*, and ran to the middle of the floor toward the door, Jacobi then caught her and she was trying to get loose from him and he was holding her there, when the police whistle blew and that he then let her loose when this alarm was given. When he turned her loose he put on his coat and went to the door and the *the* police officers came into the room. Police Officer Cowling asked if he must arrest Jacobi. She said not to arrest him; that he had done no harm to her except to bring her there under the pretense that he was taking her to a nice boarding-house, and that she did not want the man arrested as she did not want the matter made public and because she must go on home on account of the illness of her mother.

Policeman Cowling sent Rapport to town for a carriage to take her to police headquarters. She went into the chief-of-police office and had a conversation with Capt. Martin. He dismissed everybody from the office and he and she were alone. He asked her name, age and place of residence: she told him her name was Lizzie Parker; that she had always resided at Clanton, Ala., and never had lived in a large city, that she was twenty-three years old; that she had taught a school once at some point several miles out in the country from Georgiana, but was not teaching at that time and was there on a visit. She was on her way home in obedience to a telegram which she had received to the effect that my mother was very ill. Captain Martin said to her, "I am old enough to be your father, I understand you have been taken to an assignation-house by Sanford Jacobi and you can talk plainly with me with regard to the matter, in confidence and with perfect impunity, and with every assurance on my part of affording protection and enshielding you from harm. If this man has misused you, and you will consent to remain over until Monday, I will have him prose-
21 cuted to the fullest extent of the law, if he has committed any offense." She did tell Captain Martin that Jacobi had not done her any harm except to take her to that house under the promise of accompanying her to a nice boarding-house. She did tell him that Jacobi did not put his hands on her or use any improper language to her except to ask her to undress in his presence. She said to Captain Martin that she told Jacobi that she was not that sort of a woman, and that he was mistaken in her if he thought she was — sort of a girl. When the police officers, Cowling and Rapport, came into the office after this conversation with her Captain Martin asked them why *he* did not arrest Jacobi, but let him go? She told him that she had requested that he be not arrested, as she did not want any publicity given to the matter. She told him further that her mother was very ill and that she couldn't remain over until Monday to have the matter investigated. She told him further that agitation would result in harm to her. Capt. Martin told Policeman Cowling to accompany her to the Clifton house, a respectable hotel, and explain to the proprietor that it was important she should be awakened in time the next morning to take the early train for Clanton. The witness Micou further testified that Miss Parker in her former testimony swore that when she and Jacobi entered the house of Mat Howard on Pollard street, she saw nobody but a negro woman and she asked him (Jacobi) where the lady was who owned the house. He said "That's all right. She has stepped out. This is just her servant." She swore further that she did not make any outcry or give any alarm and the reason she did not do so was because she was scared and weak.

Henry Bartlett was next introduced as a witness by the State, and testified that he was a juror on the former trial of this case, in the city court of Montgomery, and heard the testimony of said witness, Lizzie Parker, on said former trial, and that she was sworn

and examined by the State and cross-examined by the defendant. His testimony was substantially the same as that of witness Micou.

The defendant made the same objections to the testimony of witness Bartlett, as are hereinabove set out to the witness Micou,
22 and upon the same grounds as hereinabove set out and disclosed, and moved to exclude the testimony of each of said witnesses on each of said grounds. The court overruled each of the defendant's objections *and* said motion and to the action and ruling of the court the defendant thereupon duly excepted, upon the same grounds as are hereinabove specified as grounds of objection to the testimony of said witness Micou.

The State then examined as a witness H. M. COWLING who testified that he was a mounted night policeman on or about June 23rd, 1900. That he and his partner, Paul Rapport, had passed the house occupied by Mat Howard on Pollard street about 10.30 p. m. Saturday night, June 23rd, 1900, when a hack drove up to Mat Howard's house and — couple got out, a man and a woman—and went into Mat Howard's house. He testified, Rapport and I rode by and stopped on the corner of Decatur and Pollard streets where there was a store and an electric light. A few minutes afterwards we stopped the hack which came up to where we were, and endeavored to investigate the matter by questioning the hackman, Ed. Iverson. He said that he did not know who the people were—that he got them at the depot—that they were just country people and the man wanted a nice house to stay for the night. We dismounted, Rapport and I went back to the house to investigate. I went around to the west window which is about sixteen feet from the front door. The sash of the window was up but the blinds were closed, but were aslant. A young woman was sitting in a chair near the window and Sanford Jacobi tried to sit in her lap. They were so close that if the blinds had been open I could have touched them with my hands. A light was burning in the room and I could see them distinctly and hear every word they said. Sanford Jacobi proposed that they retire and have a good time for the night, saying he had ordered a good breakfast and a hack so the young lady could reach the depot in time for the morning train. She objected and the defendant, Jacobi, said: "Is this the way you are going to treat me after I have been so nice to you, and are you not going to bed with me?" She replied "that she could do nothing of the kind and that she was not going to stay there,
23 and that she was going." He asked her "where she was going," and she replied "she was not going to stay there." He said "Well I am going to leave you" and put on his coat and started to the door. She said "What in the world am I to do, I cannot stay here?" His reply was "I don't know and I don't care; after I have been so nice to you as I have then for you to treat me as you have." When Jacobi tried to sit in the chair with her, the young lady got up from the chair where she was sitting and went over and sat down on the side of the bed. Before she went to the bed Jacobi tried to persuade her to spend the night with him, and she said "If you think I am going to spend the night with you you

are sadly mistaken." (She made no outcry and made no alarm. They did not speak in a loud tone. There was a house on the west side of Mat Howard's house within ten feet of where the couple was seated. There was also a house on the east side within twenty-five feet. There was an electric light on the corner of both Decatur and Union streets, on the west and east sides of Mat Howard's house, Mat Howard's house being about half way the block.) Jacobi, when he sat down on the bed beside Miss Parker, put his arms around her and said "Sweetheart, don't treat me this way, just pull off your shoes and corset and let's have a good time." He reached down and tried to unbuckle her shoe. The lady objected and said "I cannot do anything like that. It is not right and I have got to protect my health and honor." He then said it would not hurt *your* health, that no one need know about it, that they could spend the night together, and have a good time, that he had ordered a good breakfast for her next morning and a hack to take her to the depot in time to catch the mornings train, she wanted to Clanton; that it would not hurt her health, that she could use a wet towel after they got through; that no one would ever know of it; that everything would be all right and that she could catch the train and go on in safety. Witness testified that he did hear Miss Parker say to defendant Jacobi, "I am not that sort of a girl" and he did not hear Jacobi tell her "he would like to look in the face of a woman who was not that sort of a girl" or words to that
24 effect. When the young lady sat on the bed Jacobi went over where she was and sat down by her, put his arm around her shoulder and the other hand on her chest and pushed her back on the bed, threw his legs over her person and had his pants unbuttoned. Witness then left the window and whistled to Rapport and went to front door and went in the house, Jacobi's pants were unbuttoned but witness did not see his private member. He admitted that on his first examination on the former trial while this matter was fresh in his mind he had not testified anything about seeing Jacobi's pants unbuttoned and that in a written statement made to the chief of police shortly after this occurred he had not said anything about Jacobi's pants being unbuttoned; witness further stated when Jacobi pressed Miss Parker back on the bed and put his leg over her person that Miss Parker was trying to get away from him, witness told Rapport to go to the back door while he witness would go to the front door and that he knocked on the front door and opened it and walked in. Standing at the front door, was the young man whom he recognized as Sanford Jacobi fully dressed, who attempted to give an explanation, but witness told him he did not need an explanation and did not want one. Rapport was at the door and witness told him to hold Jacobi until he investigated further. Continuing the witness testified further "I went in and found the young lady much mortified and she said to me that she was so glad we came. I asked her what in the world she was doing here and she said she did not know. She told witness she was from Chapman, Alabama, and had a message from her mother who said she was very ill and that she was returning home, that her name

was Lizzie Parker; that she had relatives living in Montgomery; that she was compelled to remain over in Montgomery until next morning because the north-bound L. & N. train did not stop at Clanton that night; that the young man had brought her to that place under the pretense of bringing her to a nice boarding-house where she would be safe until morning; and that he told her she could get a desirable lodging and a nice breakfast and catch the
25 train in the morning. I next inquired if she wanted the man arrested and she replied she did not; that she did not want the publicity of the matter, which would follow. I told Rapport to get the horses, go to town and get a hack and send it to me. Jacobi offered to go for the hack. I told him I did not want him to go after a hack; that I ought to take my stick and beat him to death and would give him three minutes to leave. I brought the young lady up to police headquarters in the hack and reported the full particulars to Night Sergeant John Thomas, my superior officer, who ordered me to ring Capt. Martin's bell. I started to do so when I met Capt. Martin coming up the steps. I reported to him the full partic-lars of the case, and stated that the young lady was at the foot of the stairs in the hack, and I would like for him to talk to her. I told him that — young woman did not want the man arrested to save the publicity of the matter. Capt. Martin ordered me to bring the young lady to the chief's office. He talked to her in our presence, and then dismissed Rapport and me. Afterwards he called us back and ordered us to take the young lady to the hotel. During our report to Capt. Martin he asked me why we diden't bring the young man to the office and I stated because the young lady had requested us not to arrest him, and that she did not want him arrested, because she did not want the publicity it would cause, and she was compelled to go to her sick mother in the morning. She made the same statement to Capt. Martin in our presence.

Time and venue proved as laid.
Here the State *arrested*.

Defendant then offered as a witness Mr. FRANK LOCKWOOD who testified that he was an architect and that he had carefully prepared a diagram of the house known as Mat Howard's house and gave the dimensions of said house. That said house was a four-room house with a hall running north and south through it. That there was a porch in front about four feet wide, that the house faced the north; that the north side of the porch was about four feet from the
26 front gate; that there were two steps to the stairway and that the bottom step was two feet from the gate; that the west room occupied by defendant and Lizzie Parker on the night in question was 14½ feet by 17½ feet long; that there was a window on the north side and a window on the west side of the room; that there was a house within ten feet of Mat Howard's house on the west side and another house within twenty-five feet on the east side thereof; that there was no curbing to the sidewalk in front of Mat Howard's house, and nothing to prevent a carriage being driven close to the gate. The diagram of the house was then offered in evidence.

The defendant next introduced J. T. Moses as a witness in his behalf who testified that he is an insurance agent in the city of Montgomery and has an office with Emile Jacobi, the father of Sanford Jacobi, the defendant, and that they occupied these offices together on June 23rd, 1900; that Mr. C. G. Pope, special agent of the Greenwich Insurance Company of New York City, of which Emile Jacobi was local agent at Montgomery, was in the city of Montgomery on Saturday June 23rd, 1900; that Sanford Jacobi invited the said Pope to take supper with him at his father's house that night, but that said Pope excused himself upon the ground that he was not very well, and requested defendant to call at the hotel that night and accompany him to the depot, as he was on his way to New Orleans; that his train would leave that night at 9.35; and that Sanford Jacobi had gone to the Union passenger depot that night in company with the said Pope. The witness Moses further testified that he had been acquainted with Sanford Jacobi from his childhood, and that he was twenty years of age at that time, to wit: June 23rd, 1900.

This was all the evidence in the case.

Terry Richardson Esq. who assisted the solicitor as a representative of the State in the prosecution of the defendant, made the opening address to the jury. In the course of his remarks to the jury, he said, "Remember, gentlemen of the jury, that terrible struggle in the middle of the room as the defendant approached his
27 victim with vulturous hands ready to swoop down upon her, remember that awful struggle." The defendant asked the court to arrest the remarks of the said counsel, and to instruct the jury that said statement (hereinabove quoted) was not evidence and that there was no evidence before the jury in this case to support or warrant any such statement or declaration; that there was no evidence before the court and jury to the effect that any struggle had taken place between Miss Parker and the defendant while in that room, or at any time while they were together; and to exclude this statement of the counsel from the jury; but the court overruled defendant's objection, and refused to instruct the jury upon the subject or to exclude said statement of counsel objected to by defendant from the consideration of the jury; and thereupon to this action and ruling of the court, the defendant duly, separately and severally excepted.

The defendant thereupon asked the court to give the following written charge to the jury.

"If the jury believe the evidence in this case, they must find the defendant not guilty of the charge of an assault with the intent to ravish, as charged in the indictment." But the court refused to give this charge, as requested in writing, and to the action and ruling of the court defendant thereupon duly excepted. The defendant asked the court to give the following written charge or instruction to the jury: (1) "In a charge to commit rape, the evidence, to be sufficient to justify conviction, must show such acts and conduct on the part of the defendant, that there is no reasonable doubt of his intention to

gratify his lustful desire, notwithstanding any resisting on the part of the female;" but the court refused to give this charge, as requested in writing; and to the action and ruling of the court the defendant thereupon duly excepted. The defendant then asked the court to give the following written charge or instruction to the jury: (2) "Before the jury can find the defendant — of an assault to ravish in this case the jury must believe from the evidence, 28 beyond all reasonable doubt, that it was the purpose of the defendant to fully accomplish his purpose in such a manner and by such means that, if accomplished, it would be rape; that is, there must be an intent to use force, terror, intimidation and the like, necessary to accomplish the purpose;" but the court refused to give this written charge or instruction to the jury and to the action and ruling of the court, the defendant thereupon duly excepted.

The defendant asked the court to give the following written charge or instruction to the jury: (3) "The court charges the jury that the State is required to show evidence, beyond a reasonable doubt, and to a moral certainty — the existence of every fact necessary to establish the guilt of the defendant before he can be convicted. If from all the evidence to be proved," but the court refused to give this written charge or instruction to the jury, and to the action and ruling of the court, the defendant thereupon duly excepted. The defendant asked the court to give the following written charge or instruction to the jury: (4) "If the jury believe from the evidence that there was anything in the conduct of Miss Parker, which impliedly gave her consent to the defendant to put his arms around her, and take liberties with her, and he did not put his hands upon her in a rude or angry manner, but under the mistaken belief that she consented thereto, then, upon this state of facts without more, the defendant would not be guilty of an assault, or an assault and battery;" but the court refused to give this written charge or instruction to the jury, as requested by the defendant; and to the action and raling of the court, defendant thereupon duly excepted.

The defendant requested in writing the following charges or instructions which with others were given by the court and were read to the jury.

"Rape is defined to be: The unlawful carnal knowledge or a woman by force and against her will. An assault is an intentional and unlawful attempt, by force or violence, to do injury to the person of another; and in an asssault to commit a rape, the offender's 29 intent must be specific to proceed to violence, if necessary, or otherwise to do what would be rape in law." Given, Thomas, ass't judge.

"In order to constitute an assault with intent to ravish, as charged in the indictment, there must have been an intent on the part of the defendant to have unlawful carnal knowledge of Miss Parker by force and against her will, and regardless of whether she consented or refused to do the act." Given, Thomas, ass't judge.

"In order to constitute an assault with intent to ravish, there must be an intent on the part of the defendant to fully accomplish his

purpose in such manner, and by such means, that, if accomplished, it would be rape; that is to say, there must be an intent to use force, terror, intimidation and the like, necessary to accomplish the purpose." Given, Thomas, ass't judge.

"In order to constitute the offense of an assault with intent to ravish, it is necessary that the acts and conduct of the defendant should be such that there can be no reasonable doubt of his criminal intent. If the acts proved are equivocal or equally consistent with the absence of the felonous intent charged in the indictment, then they are not sufficient to warrant a verdict of guiltly." Given, Thomas, ass't judge.

3. "The court charges the jury that force is an essential constituent of the crime of rape, and before — jury can convict the defendant of an assault with intent to ravish Miss Parker, the jury must believe from the evidence that the defendant intended to use force, if necessary, to consummate a carnal connection with her—to have intercourse with her forcibly and against her will." Given, Thomas, ass't judge.

5. That fact if it be fact, that the defendant may have made indecent proposals to Miss Parker and asked her to undress and go to bed with him, and sought by solicitations and inducements to lead her to consent to have sexual intercourse with him would not without more render the defendant guilty of the offense of assault with intent to ravish her." Given, Thomas, ass't judge.

6. "Even if the jury should believe from the evidence that the defendant laid his hands upon the person of Miss Parker with the intent to have improper connection with her, but not with the object in view of forcibly ravishing her, he would not be guilty of the offense charged in the indictment of an assault with intent to ravish Miss Parker." Given, Thomas, ass't judge.

"The court charges the jury that if the evidence in this case does not clearly and unmistakably indicate a purpose on the part of the defendant to have had sexual intercourse with Miss Parker at all events, and regardless of all opposition from her, and to break down her resistance, by force if necessary, then, the evidence is insufficient to justify the jury in finding the defendant guilty of an assault with intent to ravish." Given, Thomas, ass't judge.

"The court charges the jury that before they can convict the defendant of an assault with intent to ravish Miss Parker, they must be satisfied from the evidence, beyond all reasonable doubt, not only that the defendant intended to gratify his passions by having sexual intercourse with her, but that he intended to do so at all events, and notwithstanding any resistance on her part." Given, Thomas, ass't judge.

"If the jury belive from the evidence that the defendant by indecent liberties with the person of Miss Parker sought to obtain her consent to an improper cohabitation, or carnal intercourse, and not to compel her acquiescence by force, then, upon this state of facts without more, the defendant would not be guilty of the crime of an assault with intent to ravish. The force necessary to constitute this offense, must be such as to overcome her resistence and to procure

submission on her part by means of threats, or otherwise to excite fears of bodily harm." Given, Thomas, ass't judge.

"10. The court charges the jury that unless the evidence in this case produces in the minds of the jurors a moral conviction, to the exclusion of every reasonable doubt, the guilt of the accused is not shown by that full measure of proof which the law requires,
31 and you should acquit the defendant." Given, Thomas, ass't judge.

"15. The court charges the jury that if the jury have a reasonable doubt of the truth of any fact which is necessary to convict the defendant, he is entitled to be acquitted (6.)" Given, Thomas, ass't judge.

"14. The court charges the jury that a reasonable doubt is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is, to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it." Given, Thomas, ass't judge.

The court at the request of the State gave the following written charge or instruction to the jury: "If the jury believes from the evidence beyond a reasonable doubt, that in this county and within three years before the finding of this indictment, the defendant, by a false representation of the character of the house induced Miss Parker to go with him to an assignation-house; that arriving there he locked the door of the room, took off his coat and put his arm around her, and asked her to have sexual intercourse with him; that she refused and moved her seat; that he followed her to the bed when she sat down upon the side thereof, if she did so sit, and again put his arm around her, forced her down upon the bed and threw his leg over her, at the same time having his pants unbuttoned and exposing that part of his person, and that while in said room, said Jacobi told her that she had to stay with him; that afterwards she got away from the bed and started across the floor, he again caught hold of her and was holding her when there was a knock upon the door, and he then released her, and started to putting on his clothing, the jury are authorized to look at these facts, if they be facts, in connection with all the other evidence in the case in determining whether or not the defendant assaulted
32 Miss Lizzie Parker, and if he did so assault her, whether or not at the time of such assault he had the intent to have sexual intercourse with her against her will, and by force, if necessary to accomplish his purpose, and if the jury are satisfied beyond a reasonable doubt, that defendant did assault Miss Lizzie Parker and had at the time such intent, he would be guilty of an assault with the intent to ravish, and the jury should so find." And to this action and ruling of the court in giving said written charge and instruction to the jury at the instance of the State, defendant thereupon duly excepted.

The court gave the following written charge, or instruction to the jury at the instance of the State:

"Any touching by one person of the person of another in rudeness or in anger, is an assault and battery, and every assault and battery includes an assault." And to the action and ruling of the court in giving said written instruction or charge to the jury, at the instance of the State, the defendant thereupon duly excepted.

Now comes the defendant, and tenders this the foregoing, as a true and correct bill of exceptions, which is accordingly signed and sealed by the presiding judge of said city court of Montgomery, as a true and correct bill of exceptions in said cause, in accordance with written orders of this court, duly entered of record in term *term*, allowing the defendant until the 25th day of November, 1901, in which to prepare, present and have signed the bill of exceptions in said case.

Nov. 19 1901.

W. H. THOMAS,
Associate Judge of the City Court of Montgomery.

THE STATE OF ALABAMA, }
Montgomery County. }

I, Henry H. Matthews, clerk of the city court of Montgomery in and for said county and State, do hereby certify that the foregoing pages numbered from one to fifty-six (56) inclusive contain a full, true and complete transcript of the record and proceedings
33 of said court in a cause lately therein pending wherein The State of Alabama was plaintiff and Sanford Jacobi was defendant.

And I further certify that on the 17th day of August, 1901, the said defendant prayed for and was granted an appeal from the judgment of said court in said case to the supreme court of Alabama.

Witness my hand this the 14th day of December A. D. 1901.

H. H. MATTHEWS,
Clerk of the City Court of Montgomery.

34 THE STATE OF ALABAMA *versus* SANFORD JACOBI. } Appeal from City Court of Montgomery.

Comes the said defendant, Sanford Jacobi, appellant, and says that in the record and proceedings of the court below, there is error; and he assigns the following errors:

1st. The court below erred in overruling defendant's objections to the admission in evidence of the declaration of Lizzie Parker deposed to by the witness C. E. Thomas, said declaration being: "I had rather die than to come back to another trial and go through the same ordeal;" and in admitting said evidence. Rec. p. 22.

2nd. The court below erred in overruling defendant's motion to exclude as evidence, the following declaration of Lizzie Parker deposed to by the witness Thomas: "I would rather die than to come back" &c. Rec. p. 22-23.

3rd. The court below erred in overruling the objections of defendant to the evidence of the witness Thomas, as to the absence of Lizzie Parker from the State of Alabama, and in overruling defendant's motion to exclude said evidence. Rec. p. 22.

4th. The court below erred in overruling the objection of the defendant—renewed—to the evidence of the witness C. E. Thomas. Rec. p. 23 (bottom)

5th. The court erred in permitting the witness Micou, against the objection of the defendant, to give in evidence the substance of the testimony given by the witness Lizzie Parker on a former trial of the defendant. Rec. p. 25.

6th. The court erred in overruling the objections of the defendant to the evidence of the witness W. H. Micou. Rec. p. 25.

7th. The court erred in admitting the evidence of the witness W. H. Micou against the objections of the defendant. Rec. p. 25–26.

8th. The court erred in overruling the objections of the defendant to the testimony of the witness Henry Bartlett, and in admitting said testimony against the objections of the defendant. Rec. p. 37.

35 9th. The court erred in overruling defendant's motion to exclude the evidence of the witness Henry Bartlett. Rec. p. 37.

10th. The court erred in refusing the charge requested in writing by defendant beginning with the words: "Before the jury can find the defendant — of an assault" &c. set out on page 48 of the record. Rec. p. 48.

11th. The court erred in refusing the charge requested by defendant, beginning with the words: "In a charge to commit rape" &c. set out on page 47 of the record. Rec. p. 47.

12th. The court erred in refusing the charge requested by defendant beginning with the words: "The court charges the jury that the State is required" as set out on p. 48 of record. Rec. p. 48.

13th. The court erred in refusing the charge requested by defendant, beginning with the words: "If the jury believe from the evidence that there was anything in the conduct" &c. Rec. p. 49.

14th. The court erred in refusing the charge requested by defendant beginning with the words: "Rape is defined to be" &c. Rec. p. 49.

15th. The court erred in admitting the evidence of Lizzie Parker given on a former hearing of the same indictment, as deposed to by the witness W. H. Micou, in that by and as the result of admitting said evidence the defendant was found guilty as charged and sentenced to the term of twenty years in the penitentiary of the State of Alabama and thus deprived of his liberty, without due process of law, in violation of the following provisions of section 1 of article XIV of the Constitution of the United States: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

16th. The court erred in permitting the witness W. H. Micou to testify as to and give in evidence, the testimony given by Lizzie Parker on a former trial of the same indictment, said evidence was

violative of the guaranties of the common law as embodied and declared in that part of section 7 of article 1 of the then constitution of the State of Alabama providing that the accused has a right "to be confronted by the witnesses against him," which said provision of the common law was of force at the date of the adoption of the Constitution of the United States. The admission of said evidence was therefore violative of that part of section 1 of article XIV of the Constitution of the United States which declares: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

17th. The court erred in permitting the representative of the State, in argument before the jury, to use the words to which defendant objected. Rec. p. 46.

18th. The court erred in refusing the general charge requested by defendant, in respect to the crime of assault with intent to ravish.

19th. The court erred in determining the sufficiency of the evidence introduced to prove the absence of the witness Lizzie Parker from the State of Alabama and in this withdrawing the question of the sufficiency of said evidence from the jury. Rec. p. 23 (bottom).

20th. The court erred in not submitting to the jury the question of the weight and sufficiency of the evidence introduced to prove that Lizzie Parker was absent from the State of Alabama. Rec. p. 23.

21st. And now comes in his own proper person plaintiff in error in the above numbered and entitled cause, and which error complained of is now before this honorable court for review, consideration and decision, said error having been properly sealed by the trial judge, who certifies it to this honorable court for its review and decision. And here giving presently the court to understand and be informed that in addition to the error embodied in the bill sealed as aforesaid there is other error apparent upon the record and of which this appearer complains, the same having operated to his manifest injury and prejudice, inasmuch as it appears by said record that this appearer is a citizen of the United States, having been born therein, and is a citizen of the State of Alabama, within which State
37 he resides, and was a citizen of the United States and of the State of Alabama at the time of and since the acts complained of and which are charged against your appearer as being violative of the laws of said State, as is patent upon said record, your appearer, during the progress of the trial before the city court of Montgomery, county of Montgomery, State of Alabama, and at all times since said trial and now and presently here, has been and is denied the benefits, advantages and protection accorded him by section 7 of article 1 of the constitution of the State of Alabama: and was, during the process of said trial at all times since and is now, by the action of the State of Alabama and its prosecuting officers in this behalf denied the privileges and immunities accorded him by the fourteenth amendment to the Constitution of the United States, and the denial of which privileges and immunities, as a citizen of the State of Alabama and of the United States, he pleads as cause of error patent upon the record, demanding, in accordance with law, its mainte-

nance by this court, and the verdict and judgment pronounced thereon against this appearer.

And for further and additional error patent upon the record, this appearer says that he was, during the progress of the trial now before this court for review, throughout said trial, after verdict and judgment pronounced upon verdict, at all times since, and is now, by the State of Alabama and its prosecuting officer been refused and denied the benefit and protection accorded him, as a citizen of the United States and the State of Alabama, by the fourteenth amendment to the Constitution of the United States, inasmuch as this appearer was denied and refused the protection of said article of the Constitution and was tried and convicted without the benefits, advantages and protections guaranteed to him by the fourteenth amendment to the Constitution of the United States, that he should have at all stages during the trial and in proceedings subsequent to the trial, the benefit and protection of said article, and particularly so much thereof as guarantees to him due process of law; and
38 that this refusal and denial to accord him, in the progress of the trial and at all times since, due process of law is error patent upon the face of the record which demands the reversal of the judgment pronounced upon the verdict herein complained of.

Appearer further assigns as error patent upon the face of the record, that during the progress of the trial hearsay evidence was administered and allowed, by the ruling of the court, after timely objection, to go to the jury for their consideration, which evidence so administered was material in the cause and without which testimony, as appears by the record, and particularly the testimony of W. H. Micou and Henry Bartlett, no conviction could have been secured; and the administration of such evidence was in violation of the common law, in violation of the rights of the appearer, in violation of the constitution of Alabama, and of the fourteenth amendment to the Constitution of the United States and is reversible error.

And this appearer for further error patent on the face of the record, assigns as cause the withdrawal of issues of fact from the jury as to whether a proper predicate had been established by the evidence administered, to admit of second-hand or substituted proof of a fact material to the State's cause; that under the common law as administered and under the protection accorded him of due process of law by the fourteenth amendment to the Constitution of the United States, the withdrawal of the question of fact as to whether a proper predicate had been laid for the administration of subordinate and secondary proof was a question determinable not by the court, but by the jury; and before the administration of secondary proof and particularly the testimony of W. H. Micou and Henry Bartlett; and the action of the court as appears by the record, in determining a question of fact which should have been, under the law and the Constitution of the United States, submitted to the jury, violates appearer's rights under the constitution of the State of Alabama, the laws prevailing in said State, and the fourteenth amend-

ment to the Constitution of the United States, it operating a
39 denial of the benefit and protection accorded this appearer by said fourteenth amendment to the Constitution of the United States.

And for further assignment of error patent upon the face of the record, this appearer says there was not sufficient predicate laid for the administration of any proof as to what any absent witness had said previously or on any former trial; and that your appearer was denied the benefits, advantages, and protection guaranteed to him by said fourteenth amendment, inasmuch as he had not the opportunity of confrontation with the witnesses against him, and the statements made by them were not admissible as evidence against this appearer and should not have been submitted to the trial jury in the absence of a precedent fully established, and which would admit the administration of that character of proof; and that, in consequence of the action of the court, during the trial, upon judgment and at all times since, the State of Alabama through the officer representing in this behalf, has denied to this appearer the benefits, advantages and protection accorded him by the common law, the constitution of the State of Alabama, and the fourteenth amendment to the Constitution of the United States.

Wherefore, for these and divers other good and sufficient reasons appearing on the face of the record, this appearer asks that the errors herein complained of may be considered, and after consideration thereof, the said errors be recognized by this honorable court, as cause good and sufficient justifying by the court's decree a reversal of the judgment pronounced in the cause and the verdict upon which such judgment and sentence were entered; and that such further orders be made and entered as are necessary in the premises to accord to this appearer that measure of protection to which he is entitled under the constitution of the State of Alabama, and the fourteenth amendment to the Constitution of the United States, in such cases made and provided.

A. A. WILEY,
JNO. W. A. SANFORD, JR.,
J. M. CHILTON,
HENRY L. LAZARUS,
Attorneys for Appellant.

40 STATE OF ALABAMA, }
County of Montgomery. }

Sanford Jacobi, duly sworn, deposes and says that he has read the foregoing assignments, in his behalf; that he is advised the same are sound in law; that he invokes the protection accorded him as a citizen of the United States and of the State of Alabama, by the fourteenth amendment to the Constitution of the United States, and that said assignments are, upon the advice of counsel, interposed in good faith, in the honest belief that the errors assigned demand the reversal of the judgment in said cause.

SANFORD JACOBI.

Sworn to and subscribed before me, this 18th day of December, 1901.

J. W. TERRY,
Notary Public.

[NOTARIAL SEAL.]

(The foregoing affidavit is attached to assignments of error after the 19th and is on file.)

41

APR. 17, 1902.

THE STATE OF ALABAMA,
Judicial Department.

The Supreme Court of Alabama, November Term, 1901.

SANFORD JACOBI
v.
THE STATE OF ALABAMA. } 3 Div., 289.

Appeal from Montgomery city court.

MCCLELLAN, *C. J.:*

Upon a full and exhaustive consideration of the question on principle and authority, this court in *Lowe v. State*, ruled that "the testimony of a witness on a former trial or prosecution of the defendant, for the same offense, is admissible as evidence against him on a second trial, if the witness is beyond the jurisdiction of the court, whether he has removed from the State permanently or for an indefinite time;" or, to state the ruling perhaps more accurately, that when the witness has removed from the State permanently or for an indefinite time, his testimony on any former trial of the defendant for the same offense may be given in evidence against the defendant on any subsequent trial—86 Ala. 47. This decision has been often followed and reaffirmed by this court. We are entirely satisfied of its soundness; and we now again follow and reaffirm it.

Whether the predicate for the introduction of secondary
42 evidence reproducing the testimony of Miss Parker on the former trial was sufficiently and properly laid on the last trial, is another important question for adjudication on this appeal. Of course the burden was upon the prosecution to show to the reasonable satisfaction of the trial judge that the witness had left and was out of the State at the time of the trial, and that her absence was of a permanent or indefinite nature. On this matter evidence was adduced before the judge of the city court that process to secure the witness' attendence had been sent to the counties of Chilton, Jefferson and Butler. Chilton was the county of the witness' last known residence in this State. The process was returned from that county "not found." It does not appear in evidence why process was sent to the county of Jefferson. It too was returned "not found." It appeared that the witness had at some indefinite time in the past taught school in Butler county, that after this, she returned there in the summer of 1900 on a visit, and that she was returning from

that visit to her home in Chilton county when the assault was committed on her by the defendant. This writ to Butler county had not been returned. The further evidence adduced by the State tending to prove that the witness was permanently or indefinitely beyond the jurisdiction of the court was the testimony of C. E. Thomas, as follows: "That he is a half-brother of Miss Lizzie Parker (the absent witness) of Clanton Alabama; that he resides in Birmingham, Alabama, and has been residing and was so residing there on the 23rd day of June 1900 (the date of the offense); that he had not resided with his mother and sister for the past five or six years; that on or about the 23rd day of June 1900, his mother, who was then residing in Clanton (Chilton county), became quite ill, and wired for witness to come to her bedside; she also summoned his sister, Miss Lizzie Parker, who was on a visit to relatives at Chapman, Butler county, and that she arrived at Clanton on Sunday the 24th day of June, 1900; that his sister said nothing to him as to what occurred between her and Sanford Jacobi in Montgomery on the previous night, and that he knew nothing of it until he saw and read a publication thereof in the Montgomery Advertiser on Tuesday morning June 26th 1900; that he then mentioned the matter to his sister, and she said she was sorry any publicity had been
43 given to the matter as it would tend to injure her; that Miss Lizzie Parker was about twenty-three years old in June 1900, and lived with her mother at Clanton, Alabama, and that she had no other home than with her mother, and that her mother had no other home in June 1900; that his mother is a widow; that some time in the month of January, 1901, his mother broke up her home in Alabama, and sold her house and lot and sold off all her household goods, except a little furniture which has not yet been sold, broke up housekeeping and went to Georgia; that his sister, Lizzie Parker, had gone to Georgia before her, about the 1st of January 1901; that he had received a letter from his sister, Lizzie, which he knew to be in her handwriting, about two weeks before the date of this trial (Aug. 5, 1901), from Buena Vista, Georgia, the envelope containing said letter being postmarked Buena Vista, Ga., that his sister is an unmarried woman and has no home other than that of her mother; that witness at the time she left Alabama, did not say anything about a change of domicile, or about leaving the State permanently, or about acquiring a residence elsewhere than in Alabama; that witness did not know when his sister would return to Alabama, if at all, and that he knew nothing whatever about her intentions upon this subject; that his sister, Miss Lizzie Parker, had testified as a witness for the State at the October term 1900, on the trial of the case of The State against Sanford Jacobi under this indictment, and that said trial resulted in a mistrial, and that shortly after the former trial, which occurred in November 1900, he had a conversation with his sister, Lizzie Parker, in reference to said trial, in which she stated: "'I had rather die than to come back to another trial and go through the same ordeal.'" On the cross-examination of the witness Thomas, in answer to a question propounded by defendant, as follows: "Are you able to state whether

or not your sister's stay in Georgia is indefinite," the witness said he could not. In answer to another question propounded by defendant, witness said he 'was not able to state whether or not his sister, Lizzie Parker, was in the State of Alabama at this time or not, nor was he able to say whether or not she had been continuously absent from the State of Alabama from the time she left Clanton in January 1901 up to the time witness received said letter from some point in Georgia, the envelope of which was postmarked 'Buena Vista, Ga.' as he had before testified."

The absence of a witness from the State may, for the purpose under discussion, be shown in two ways. It may be made to appear by evidence of a proper and fruitless search for him in every county in which there is any apparent likelihood of his being found, from which an inference may be reasonably drawn that he is beyond the jurisdiction of the court; or, without resorting at all to proof of such vain search, it may, of course, be shown directly that he is in another State under circumstances from which it is fairly inferable that his return is contingent, uncertain and speculative.—*Mitchell v. State*, 114 Ala. 1, 3; *Thompson v. State*, 106 Ala. 67, 74. And evidence of this latter character may, of course, be strengthened in respect of the absence from this State by the fact that officers charged under process with the duty of finding him here have failed to find him in the county of his former residence. We do not understand that it was sought to lay the necessary predicate in this case by evidence of the former class, but that the evidence of the issue and return of subpoenas or attachments was intended to be and was considered by the trial court only along with the other evidence as to this witness being in the State of Georgia. None of the evidence as to the writs was of importance except that as to the process which went to Chilton county the former home of the witness. It did not appear that there was any likelihood of the witness being in the county of Jefferson or in the county of Butler. It was not shown that she had ever been in Jefferson or had any occasion to be there. So the fact that she was not there when the writ was in the hands of the sheriff of that county has no legitimate tendency to show that she was out of the State. As to Butler county it was shown that she had been there temporarily at some unidentified time in the past engaged in teaching a school, but this engagement had ended some considerable time before the offense charged; and that just before the assault upon her she had returned to that county on a visit to relatives, a necessarily temporary occasion which had ended on the day of the assault.

There being no likelihood of her presence in Butler county
45 at the time of the trial or just prior thereto there was no occasion to send process to that county for her, the return of not found on such process would not have shown that she was absent from the State, and the failure of the officer to return the writ at all neither authorizes an inference that she was in that county nor goes to weaken other evidence tending to show that she was beyond the jurisdiction of the court. But the return of the sheriff of Chilton county that she could not be found in the county of her former residence was pertinent and competent, and entitled to con-

sideration in connection with the other evidence going to show her absence from the State.

The inquiry then being whether the witness was beyond the jurisdiction of the court, that is, beyond the boundaries of the State, we have a return of an officer going to show that she could not be found in the county of her former residence, the only residence there is any evidence tending to show she ever had in the State, and with this the testimony of her brother, that her home had been up to January 1901 with her widowed mother in Clanton, Chilton county, that in said month this home had been entirely broken up, that the mother sold her house and lot—her home—in Clanton, and all her household effects except a little furniture "which has not yet been sold,"—the inference being that even this remnant was for sale—"broke up housekeeping," "*broke up her home in Alabama, and went to Georgia,*" that his sister also went to Georgia, that she, the sister, was in Georgia six months after this removal, the *prima facie* presumption being that she had remained there during that time, and was in Georgia two weeks before this trial, the *prima facie* presumption being that she had continued there up to and was there at the time of the trial; and in effect, that if either the mother or sister had ever returned to Alabama he, the son and brother knew nothing of it. In addition to this there is evidence of a *motive* on the part of Miss Parker to remove herself beyond the jurisdiction of the court and to remain out of the State indefinitely. She declared to her brother some time within the period of less than two months intervening between the time of the first trial and her departure to Georgia, that she had rather
46 die than return and go through the ordeal of another trial, her precise language being: "I had rather die than to come back to another trial and go through the same ordeal." Here there is proof of adequate motive for Miss Parker to leave and to remain indefinitely out of the State. Here is proof that the only home she had or ever had in the State was broken up, the house that sheltered her and the household goods sold. Here is proof that the mother, with whom she lived and had always lived, and naturally would live as long as she remained unmarried, having no longer a home in Alabama, nor aught else, so far as the evidence goes, to keep her here or to bring her back, but having thus disposed of all her effects, went to Georgia, and the daughter with her; and *prima facie* that since they went they have there remained, and were there at the time of the trial. Being there under these circumstances there is no warrant for saying their stay is of a temporary nature, but every pertinent consideration points to its indefiniteness, if not indeed to its permanency. So we conclude, in line, we believe, with all of our adjudications, all which have been attentively considered, that the evidence with requisite clearness showed that the witness, Lizzie Parker was permanently or indefinitely absent from the State at the time of the trial below, and that the city court properly admitted evidence of her testimony on the former trial.

We have not been inattentive to the objection and exception reserved in the court below to the admission in evidence of the decla-

ration of Miss Parker that she "had rather die than to come back to another trial and go through the same ordeal," nor to the strong argument of counsel in support of that exception. But we are of opinion that the position is not tenable, and that the declaration belongs to that class of expressions of present mental conditions which are competent as exceptional from the rule against hearsay and wholly apart from the doctrine of *res gestæ*. There being evidence of Miss Parker's having left and being absent from the State, the further inquiry was whether that absence was of a temporary, or of a permanent or indefinite nature, and this was largely a matter of intention on her part deducible from the considerations and purposes which actuated her in leaving and remaining out of the State. Expressions by her of mental conditions having a bear-
47 ing on this inquiry which to all appearances were made naturally and sincerely, are admissible as original evidence. It is of this class of declarations among others that Mr. Greenleaf says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence and often the only proof of its existence; and whether they were real or feigned is for the jury to determine (the court in this instance). In the words of L. J. Mellish: 'Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were.' This use of such statements is often spoken of as admissible under the *res gestæ* notion, or as 'original' evidence, *i. e.* not an exception to the hearsay rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the hearsay rule, *e. g.* where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice, or where running away is taken as indicating fear. But where a distant assertion in the form of words predicating a mental state is offered,—as 'I have a pain in my side,' or 'I have the intention of going out of town,' or 'I do this for such and such a reason,'—this language is no less an assertion of the existence of a fact than is an assertion of any other sort of fact; in the neat phrase of L. J. Bowen: 'The state of a man's mind is as much a fact as the state of his digestion;' and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the hearsay rule. To admit them then is to make an exception to the hearsay rule. The different kinds of facts that may be the subject of such assertions may be grouped as follows: (1) Assertions of pain or other physical condition; (2) assertions of plan, design, intention; (3) assertions of feeling, emotion,
48 motive, reason; (4) sundry assertions by a testator."

"The existence of a person's design or plan to do a thing is relevant circumstantially to show that he ultimately did it. The

presence of the design or plan may be evidenced circumstantially by conduct; but the person's assertion of a present design or plan when made in a natural way and not under circumstances of suspicion, is admissible under the present exception. The *res gestæ* notion is often put forward, but improperly, as the justification of this; for the reason already explained such statements must be regarded as admissible by virtue of the present exception. They are generally treated as admissible; though a few courts are found to exclude *to* them, usually through a misapplication of the *res gestæ* principle. Statements of intent where the intent becomes material in determining a person's domicile, are sometimes treated as admissible by reason of the *res gestæ* or verbal-act doctrine; but it is perhaps better to regard them as governed by the present exception. Statements of intent accompanying an alleged crime are usually admitted according to the *res gestæ* doctrine."

"Statements of reason, motive, feeling, emotion are equally included under the general principle, and are admissible so far as they appear to be natural and sincere. For example, where the reason or motive for the departure of certain workmen was a part of the plaintiff's case, the statements of the workmen to the superintendent, when leaving, as to their reason for it, were admitted. * * * So also statements describing one's fear, belief, cheerful or melancholy feelings or the like, physical disgust, hostility or affection, and the like." 1 Green. Ev. § 162*a*–162*d*. The supreme court of Minnesota applied the principle just stated to the declaration of an absent witness that he was then domiciled in another State, in connection with evidence that he had left the State of the forum; and held on evidence very like that in the case before us that the testimony of the witness on a former trial was admissible. *King v. McCarthy*, 54 Minn. 190. In a leading case in Massachusetts. the court held: "Declarations of a person accompanying a change of his abiding place have always been held competent to explain the change as a part of the *res gestæ*; but declarations in such cases
49 are often admissible on a broader ground than as part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be introduced if it is free from objection in other particulars. The intention may be inferred from acts and conduct, and conduct which tends to show the intention is competent for that purpose. Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention."—*Viles v. Waltham*, 157 Mass. 542.

The declaration of Miss Parker showed a state or condition of her mind bearing directly on the inquiry whether she had left the State and whether her absence was temporary, or indefinite or permanent, and tended naturally to show such motive and intent in leaving as supports the conclusion that her absence is at least of an indefinite nature. It was properly received in evidence and considered by the city court, under the authorities and principles to which we have adverted, and is a part of the evidence for our consideration here in

determining whether the witness is indefinitely absent from the State. The declaration is a perfectly natural one for Miss Parker to have made under the circumstances, and entirely in line with the disposition to avoid putting herself forward and publicity which she has shown throughout this case. There can scarcely be a doubt that the declaration was a sincere statement of the condition of her mind on the subject of attending another trial of this defendant, a condition which would naturally lead her to leave and remain away from the State.

It may be that the evidence before the judge of the city court other than this declaration was sufficient to establish the necessary predicate for proof of Miss Parker's former testimony. We have not considered it except in connection with the declaration, deeming that clearly competent. And if such other evidence was sufficient, the admission and consideration of this declaration by the city court, conceding that action to have been erroneous, would not require or authorize a reversal. This issue upon which the declaration was received was one solely for the determination of the judge. The evidence was addressed to him alone, and not to him and the
50 jury, as, for instance, evidence to lay a predicate for confessions is addressed; and the question here is not whether he received irrelevant or otherwise incompetent evidence, but whether the competent evidence before him proved the preliminary facts involved in the inquiry.—*Burton v. State*, 107 Ala. 68.

The first charge given at the request of the State is not open to the criticisms made by counsel. The charge in its fore part requires the jury to believe the facts hypothesized beyond a reasonable doubt, and then before directing the jury as to any conclusion upon them, the charge declares that the jury are authorized to look at these facts *if they be facts*, in connection with all the other evidence etc. etc. thus authorizing a consideration of facts stated hypothetically, not if believed by the jury merely, and not even merely if believed beyond a reasonable doubt by the jury, but if and only if the facts absolutely exist. The charge in this respect is too favorable to the defendant. If it is faulty in singling out certain facts to the exclusion of others, that fault would not require a reversal for the giving of it.

We do not feel that any argument or suggestion is necessary to sustain the proposition of the second charge: "Any touching by one person of the person of another in rudeness or in anger, is an assault and battery; and every assault and battery includes an assault."

That there was evidence before the jury tending to support every material allegation of the indictment there can be and is no sort of doubt; and for the court below to have given the affirmative charge requested by the defendant would have been a most palpable and flagrant invasion of the right and exclusive province of the jury to pass upon the sufficiency of this evidence.

Charge 1 was properly refused to the defendant for that it assumes that the charge against him was rape; and if this fault were eliminated, its refusal would yet not work a reversal because the sub-

stance of it was given the jury in another instruction requested by the defendant.

Charge 2 refused was properly refused both for the reason that an important word intended to be in it is omitted from it, and
51 for the further reason that with the word supplied the charge is unsound. It is not essential to the crime of assault with intent to ravish that the perpetrator should have intended that his accomplished act should be rape. The expression of the charge is inapt and inaccurate.

Charge 3 refused to defendant is elliptical and incomplete on its face.

Charge 4 refused to the defendant was abstract. There was no evidence of any conduct or anything in the conduct of Miss Parker which impliedly or otherwise gave her consent to the liberties taken by defendant with her person. The charge also specifies some facts and excludes others from the jury's consideration.

We find no error in this record and the judgment of the city court must be

Affirmed.

52 *Transcript of Minute Entries and Judgment of the Supreme Court of Alabama in Cause of Sanford Jacobi v. The State of Alabama.*

Dec. 16, 1901.—Transcript filed. (Minutes, vol. 53, p. 73.)

SUPREME COURT, THURSDAY, *Dec. 19th*, 1901.

The court met pursuant to adjournment.

Present: All the justices.

* * * * * * *

SANFORD JACOBI
v.
THE STATE OF ALABAMA. } 3 Div., 289, Montgomery City Court.

It is ordered that this cause be passed to the Thursday of the call of the 2nd division of this court.

* * * * * * *

And the court adjourned until Friday December 20th 1901 at 10 o'clock a. m. (Minutes, vol. 53, p. 158.)

SUPREME COURT, THURSDAY, *Febr'y* 13, 1902.

The court met pursuant to adjournment.

Present: Hon. T. N. McClellan, chief justice, Hon. Jon. Haralson, associate justice, Hon. H. A. Sharpe, associate justice, Hon. J. R. Dowdell, associate justice.

* * * * * * *

SANFORD JACOBI
v.
THE STATE OF ALABAMA. } 3 Div., 289, Montgomery City Court.

Come the parties by attorneys, and argue and submit this cause for decision.

* * * * * * *

And the court adjourned until Tuesday April 8th 1902 at 10 o'clock a. m.

53 (Minutes, vol. 53, p. 213.)

SUPREME COURT, THURSDAY, *April* 17, 1902.

The court met pursuant to adjournment.

Present: Hon. Thomas N. McClelland, chief justice, Hon. John R. Tyson, associate justice, Hon. Henry A. Sharpe, associate justice, Hon. James R. Dowdell, associate justice.

* * * * * * *

SANFORD JACOBI
v.
THE STATE OF ALABAMA. } 3 Div., 289, Montgomery City Court.

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the court, it is considered that in the record and proceedings of the city court there is no error. It is therefore considered that the judgment of the city court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the city court.

* * * * * * *

And the court adjourned until Monday April 21st 1902 at 12 o'clock m.

54 Copy.

(Fac-simile of filing.)

Supreme Court of Alabama.

Filed Apr. 21 1902.

ROB'T F. LIGON, JR., *Clerk.*

In the Supreme Court of the State of Alabama, November Term, 1901, Third Division.

STATE OF ALABAMA
vs.
SANFORD JACOBI. } No. 289.

To the honorable the chief justice of the State of Alabama or to the honorable the Chief Justice or any associate justice of the Supreme Court of the United States:

The petition of Sanford Jacobi, a citizen of the United States and of the State of Alabama, wherein he resides, respectfully represents: That in the above entitled and numbered cause, then pending therein on appeal from the city court of Montgomery, county of Montgomery, State of Alabama, and wherein your petitioner was appellant, the supreme court of the State of Alabama did, on the 17th day of April, 1902, rendered a judgment and decree against your petitioner in a certain cause wherein The State of Alabama was plaintiff and prosecutor, and your petitioner was defendant, by which said judgment it was ordered, adjudged, and decreed that the judgment of the court of first instance—to wit—the city court of Montgomery—be and the same was thereby affirmed against your petitioner, the decree and judgment of the court of first instance being based upon the verdict of a jury called to try the said cause of the State of Alabama against your petitioner, and which judgment condemned and sentenced your petitioner to imprisonmennt at hard labor for the period of twenty years, and defendant to pay the costs of the prosecution.

That the affirmance of the judgment of the court of first instance by the honorable the supreme court of the State of Alabama, on the day and date aforesaid, is final; and that the said honorable supreme court of the State of Alabama, pronouncing said decree in affirmance of the judgment of the court of first instance, is the
55 highest court of the State of Alabama in which a decision in the said proceedings could be had, and that said decision, on the day and date aforesaid, became and is final.

Your petitioner avers that he is aggrieved by said judgment and proceedings in said suit and cause; that in said judgment and in the proceedings had prior thereto in said cause, errors were committed to the prejudice of your petitioner in this: that there was, in said suit, drawn in question the validity of a statute or constitution of or an authority exercised under a State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision in said suit was in favor of their validity; and that rights, titles, privileges, and immunities were in said suit claimed by petitioner under the Constitution and statute of and commissions held and authorities exercised under the United States, and the decision in said suit was against the titles, rights, privileges, and immunities specially set up and claimed therein by petitioner under such Constitution, statutes, commissions, and authority, as will hereinafter more fully appear, and which will more particularly appear by the

assignments of error forming part of this petition, which are annexed hereto and are to be considered as part hereof.

Petitioner further represents that under an indictment lodged by the grand jury in the city court of Montgomery, he was charged with an offense, to which charge, after due proceedings, he plead "not guilty;" that upon the issues formulated the cause was duly assigned for trial; that upon the trial thereof, the State of Alabama tendered as witnesses one W. H. Micou and one Henry Bartlett; that after disclosing to the court the fact that neither had any personal knowledge of the facts to which they were called to testify, and that the tender of their testimony on behalf of the prosecution and to sustain the charge preferred, for which petitioner was then on trial, was simply to repeat from memory what the prosecutrix had previously stated; that, the said Micou and Bartlett in no man-
56 ner avouching the truthfulness of the statements to which they were about to testify, timely objection was made, on behalf of the defendant, to the administration of the proof tendered, the State having failed to lay a proper and sufficient predicate to justify the administration of the character of proof tendered; that the trial court overruled the objections of the defendant, and admitted the statements of said Micou and Bartlett as evidence, the said statements admittedly originating with the prosecutrix, Lizzie Parker, and of which she alone had knowledge and to which she alone could testify.

That the administration of the statements aforesaid as evidence, going to the jury in support of the charge contained in the indictment, denied to your petitioner the fundamental right of confrontation with the witnesses against him in a criminal prosecution, and which right of confrontation in criminal cases is protected and guaranteed by the force and virtue of the fourteenth amendment to the Constitution of the United States, which protects your petitioner in the possession of his life, liberty, and property, and of which he cannot be deprived without due process of law; and that the action and ruling of the trial court in this regard was a denial of the benefits, advantages, immunities, and protection of the Constitution of the United States, and particularly of the fourteenth amendment to the said Constitution of the United States.

Petitioner further represents that, as appears by the bill of exceptions embodied in the record, and upon the record itself in its entirety, embracing therein all the evidence administered in the cause, there was no evidence whatever warranting or justifying the conviction had and the judgment pronounced, without the statements of the said Micou and Bartlett, repeating what they understood to be the testimony of the prosecutrix upon some other occasion, and which, under the action, ruling, and directions of the court, the jury were charged to consider and did consider as evidence in the cause, upon which their verdict was necessarily based.

57 Petitioner further represents that on appeal or writ of error to the honorable the supreme court of the State of Alabama, there was lodged therein, prior to the hearing of the cause or the decision thereof, assignments of error asserting and claiming, on be-

half of your petitioner, the protection guaranteed to him by the Constitution of the United States and particularly the fourteenth amendment thereto, said assignments of error specifically indicating in what respect petitioner was entitled to the privileges and immunities guaranteed by the Constitution of the United States, and indicating particularly the administration of proof through said Micou and Bartlett, who, without personal knowledge thereof, undertook to repeat what the prosecutrix, Lizzie Parker, had said on some other occasion, thus denying to petitioner the substantial and fundamental right of confrontation with the witnesses against him in a criminal prosecution, and which right is protected and guaranteed under and by virtue of the fourteenth amendment to the Constitution of the United States, which prohibits a State from depriving any person of his life, liberty, or property without due process of law; that the honorable the supreme court of the State of Alabama, having considered the cause and decided the same by affirming the judgment of the trial court, denied by its decision and its decree the privileges and immunities asserted by petitioner, and the protection claimed by him under and by virtue of the Constitution of the United States, and more particularly the fourteenth amendment thereto; and that the said honorable supreme court of the State of Alabama, in its opinion and decree, having considered as good and sufficient proof the declaration of Micou and Bartlett, and which declarations were merely hearsay, as heretofore shown, denied to petitioner that protection guaranteed to him by the fundamental law of the land, of confrontation with the witnesses against him, in the prosecution by the State for a crime charged to have been committed by your petitioner.

Petitioner refers to the assignments of errors filed herewith, and prays that the same be considered, for the purposes of this
58 petition, as a part hereof; and further prays that a writ of error may be allowed and issued herein to the said supreme court of the State of Alabama, which now has the record in said cause, for the removal of said cause into the Supreme Court of the United States, to the end that the said errors in said judgment and the proceedings in said cause, may be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Supreme Court of the United States, in accordance with law; that an order be made fixing the amount of security which petitioner shall give and furnish upon said writ of error; that upon giving such security all further proceedings in the honorable supreme court of the State of Alabama be suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States; and your petitioner will ever pray.

J. M. CHILTON,
A. A. WILEY,
H. L. LAZARUS,
Ap. Counsel.

Allowed by
THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

59

Copy.

(Fac-simile of filing.)

Supreme Court of Alabama.

Filed Apr. 21, 1902.

ROBT F. LIGON, JR., *Clerk.*

In the Supreme Court of the State of Alabama, November Term, 1901, Third Division.

STATE OF ALABAMA
vs.
SANFORD JACOBI. } No. 289.

Assignments of Error.

Now comes the plaintiff in error in the above-entitled cause, and on his writ of error from the Supreme Court of the United States says that in the record and proceedings in said cause, there is manifest error to his prejudice, which he assigns as follows, to wit:

I.

That the said supreme court of Alabama erred in deciding against the validity of an authority exercised under the authority of the United States, drawn in question in this case.

II.

The said supreme court of Alabama erred in deciding against the title, right, privilege, and immunity specially set up and claimed by plaintiff in error under the Constitution and statutes and authority exercised under the United States.

III.

The said supreme court of Alabama erred in deciding in favor of the validity of the statutes and authorities exercised under the State of Alabama, drawn in question in this case, on the ground of their being repugnant to the Constitution and laws of the United States.

IV.

That the honorable the supreme court of Alabama erred in denying to the defendant the privileges and immunities accorded him by the fourteenth amendment of the Constitution of the United States, and which privileges and immunities, as a citizen of
60 the State of Alabama and of the United States, he specially plead, demanding, in accordance with law, their maintenance by the court and the reversal of the verdict and judgment pronounced thereon, in the trial court, against the plaintiff in error.

V.

That the honorable the supreme court of Alabama erred in denying to plaintiff in error, as a citizen of the United States, the protec-

tion of the Constitution of the United States and of the amendments thereto; that defendant was tried and convicted without the benefits, advantages, and protection guaranteed to him by the fourteenth amendment to the Constitution of the United States, whereas he should have had, at all stages during his said trial, and in all proceedings subsequent to said trial, the benefit and protection of said amendment, and particularly of so much thereof as guarantee- to him due process of law; and that the refusal and denial of the said supreme court of Alabama to accord him this constitutional right in the course and progress of said trial, and at all times since, is assigned as error herein.

VI.

That the honorable the supreme court of Alabama erred in that, during the progress of the trial, hearsay evidence was admitted, allowed, and considered, under the ruling of the trial court, after timely objection, which evidence so administered was material and controlling in the cause, and without which, as appears by the record, and particularly the testimony of Micou and Bartlett, no conviction could have been secured; that none of the facts testified to by said witnesses, under the court's ruling, were within their knowledge, nor did they avouch the truthfulness of the same; and that the administration of said testimony was in violation of the common law, in violation of the rights of plaintiff in error, and in violation of the fourteenth amendment to the Constitution of the United States, which guarantees to plaintiff in error due process of law.

61

VII.

That the said court erred in allowing the administration of the testimony of said Micou and Bartlett, being the alleged statements of the prosecutrix, Lizzie Parker, on another occasion, depriving plaintiff in error of the benefits, advantages, and protection guaranteed by the fourteenth amendment to the Constitution of the United States, under which is embraced the substantial and fundamental right of confrontation, in criminal cases, with the witnesses produced against the accused; and which said right, with three exceptions fixed by the common law, is absolute, and its denial or limitation is in violation of the fourteenth amendment to the Constitution of the United States, guaranteeing to all citizens of the United States due process of law.

VIII.

That the said court erred in maintaining the right of the trial court to withdraw an issue of fact from the jury—to wit, whether the proper predicate had been established by the evidence administered, to admit of substituted proof of a fact material to the State's case; that under the common law as administered in the State of Alabama, and under the protection of due process of law accorded by the fourteenth amendment to the Constitution of the United States, the question as to whether a proper predicate had been laid for the administration of subordinate and secondary proof, was a

question determinable not by the court but by the jury, and before the administration of secondary proof, and particularly the testimony of the said Micou and the said Bartlett; and that the action of the court, as appears by the record, in determining a question of fact which should have been, under the laws and Constitution of the United States, submitted to the jury, violates petitioner's rights under the common law and as protected by the said fourteenth amendment to the Constitution of the United States, inasmuch as it operates a denial of the benefits and protection accorded to the plaintiff in error by the said fourteenth amendment to the Constitution of the United States.

62 IX.

That the trial court erred in admitting, and the honorable the supreme court of the State of Alabama erred in considering, the secondary proof administered, inasmuch as there was not a sufficient predicate laid for the administration of any proof as to what any absent witness had said previously or upon any former trial; and by its act the court denied to plaintiff in error the benefits, advantages, and protection guaranteed to him by the said fourteenth amendment to the Constitution of the United States, inasmuch as he had not an opportunity of confrontation with the witnesses against him, and the statements made by them were not admissible as evidence against plaintiff in error, and should not have been submitted to the trial court, or considered by the honorable the supreme court of the State of Alabama, in the absence of a predicate fully established to the effect that the witness absent, whose testimony was sought to be reproduced, was absent through the suggestion, means, or procurement of the accused, or was dead or insane; and without the establishment of such predicate the character of proof aforesaid should not have been admitted or considered, and its consideration by the court was in disregard of the protection guaranteed to plaintiff in error by the fourteenth amendment to the Constitution of the United States, prohibiting the States from depriving any person of his life, liberty, or property without due process of law.

X.

The plaintiff in error was denied the benefits, privileges, and advantages, as well as the protection, guaranteed to him by the fourteenth amendment to the Constitution of the United States, by the trial court admitting and the honorable the supreme court of Alabama considering, not the statements of the prosecutrix, Lizzie Parker, on some other occasion, but the recollections and remembera-e of witnesses called upon to testify what those statements were, without any knowledge of the facts, and without vouching for the truthfulness of the facts as to which they testified.

63 Wherefore, plaintiff in error prays that the judgment of said supreme court of the State of Alabama be reversed, and for such further proceedings as law and justice may require.

J. M. CHILTON.
A. A. WILEY.
H. L. LAZARUS.

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Copy.

(Fac-simile of filing.)

Supreme Court of Alabama.

Filed Apr. 21, 1902. ROB'T F. LIGON, JR., *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the supreme court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Alabama before you or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between The State of Alabama, plaintiff, and Sanford Jacobi, defendant, wherein was drawn in question the validity of a statute of, or an authority under, said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error has happened, to the great damage to the said Sanford Jacobi, as by his complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, and the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court, Middle District of Alabama.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21st day of April in the year of our Lord one thousand nine hundred and two.

J. W. DIMMICK,

[SEAL.] *Clerk of the United States Circuit Court for the Middle District of Alabama.*

Allowed by
THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

65 Copy.

(Fac-simile of filing.)

Supreme Court of Alabama.

Filed Apr. 21, 1902.

ROB'T F. LIGON, JR., *Clerk.*

Supreme Court of the United States.

SANFORD JACOBI, Pl'ff in Error,
versus
THE STATE OF ALABAMA, Def't in Error.

The United States of America to The State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama wherein Sanford Jacobi is plaintiff in error and The State of Alabama is defendant in error, to show cause, if any there be, why the judgment rendered in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thos. N. McClellan chief justice of the supreme court of Alabama, this 21st day of April, A. D. 1902.

THOS. N. McCLELLAN,
Chief Justice of the Supreme Court of Alabama.

Office of attorney general, Montgomery, Ala.

APRIL 23RD, A. D. 1902.

As attorney general of the State of Alabama, I hereby accept service of the above citation and of the writ of error allowed in the above-entitled cause, and waive copy of same.

April 23rd, 1902.

CHARLES G. BROWN,
Attorney General of State of Alabama.

66 THE STATE OF ALABAMA,
Judicial Department.

The Supreme Court of Alabama, November Term, 1901.

SANFORD JACOBI, Appellant,
v.
THE STATE OF ALABAMA, Appellee. } 3 Div., 289.

Appeal from Montgomery city court.

THE STATE OF ALABAMA,
City and County of Montgomery.

I, Robert F. Ligon, clerk of the supreme court of Alabama, do hereby certify that the foregoing pages numbered from — to — in-

clusive, contain a full, true and correct copy of the record and proceedings of the supreme court of Alabama in the cause of Sanford Jacobi *vs.* The State of Alabama, lately determined by said supreme court, together with a true and correct copy of the opinion of said supreme court of Alabama and judgment entry in said cause in said court; also a true and correct copy of the petition for writ of error, assignment of error, writ of error, and citation of appeal to the Supreme Court of the United States by the plaintiff in error in said cause.

Witness, Robert F. Ligon, clerk of the supreme court of Alabama, at the capitol, this the 29th day of April, 1902.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 18550. Alabama supreme court. Term No. 341. Sanford Jacobi, plaintiff in error, *vs.* The State of Alabama. Filed May 31, 1902.

Office Supreme Court U.S.
FILED
MAY 31 1902
JAMES H. McKENNEY,
Clerk.

No. 497.

Motion to advance.

Supreme Court of the United States

OCTOBER TERM, 1901.

Filed May 31, 1902.

No. 497.

SANFORD JACOBI, PLAINTIFF IN ERROR,

vs.

STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION TO ADVANCE.

Comes now the plaintiff in error, Sanford Jacobi, by his counsel, and moves the court to advance this cause for an early hearing.

The plaintiff in error was indicted in the city court of Montgomery, Alabama, for an attempt to commit rape: was tried, convicted, and sentenced to twenty years' imprisonment in the State penitentiary. From this judgment he appealed to the supreme court of the State, and the supreme court affirmed the judgment of the city court. Whereupon plaintiff in error sued out a writ of error in this court, directed to the supreme court of Alabama, to bring the cause

for determination here. Plaintiff in error is now imprisoned under sentence of the city court of Montgomery, as affirmed by the supreme court of Alabama, and, on the facts as they appear in the record, petitions this court to advance the cause for an early hearing, in order that plaintiff in error may not longer be improperly restrained of his liberty.

HENRY L. LAZARUS,
Counsel for Plaintiff in Error.

[Endorsed:] File No., 18,550. Supreme Court U. S., October term, 1901. Term No., 697. Sanford Jacobi, plaintiff in error, *vs.* The State of Alabama. Motion to advance. Filed May 31, 1902.